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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

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13 UNITED STATES OF AMERICA ex rel. DARRYN KELLY, Plaintiff, v. SERCO, INC., a New Jersey corporation; and DOES 1-5, Defendants. } Case No. 11-CV-2975-WQH-RBB  
14 } SERCO, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT  
15 } DATE: May 19, 2014  
16 } TIME: 11:00 a.m.  
17 } COURTROOM: 14B  
18 } JUDGE: Hon. William Q. Hayes  
19 } [Documents Concurrently Filed:  
20 } Memorandum of Points and Authorities; Separate Statement of Undisputed Facts; Declaration of Daniel P. Wierzba; Declaration of Kent D. Brown; Declaration of Suzette Mankel; Declaration of Alice Hammond; Declaration of Robert A. Burton; Declaration of Denise Ellison; Declaration of Francisco Magana; Motion to File Exhibits Under Seal; Proposed Order on Motion to File Exhibits Under Seal]  
21 } NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT  
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1                   **TO THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

2                   **PLEASE TAKE NOTICE** that on May 19, 2014, at 11:00 a.m., or as soon  
3 as the parties may be heard, in Courtroom 14B, of the above-entitled court, located  
4 at 333 West Broadway, San Diego, California 92101, Defendant Serco, Inc.  
5 (“Serco”) will and hereby moves the Court for summary judgment, or, in the  
6 alternative, partial summary judgment, as to all of Plaintiff/Relator Darryn Kelly’s  
7 (“Relator”) claims under Federal Rules of Civil Procedure 56(a) on the grounds  
8 that Relator has not and cannot establish one or more of the essential elements of  
9 his claims for false claims, false records, unlawful retention of overpayments,  
10 conspiracy to submit false claims, unlawful retaliation, unlawful retaliatory  
11 discharge, termination in violation of public policy, and breach of contract of  
12 continued employment, there is no genuine issue as to any material fact, and Serco  
13 is entitled to judgment as a matter of law.

14                   In the alternative, Serco hereby moves this Court for an order granting  
15 partial summary judgment pursuant to Federal Rules of Civil Procedure 56(a) and  
16 (g), as to the following claims and issues:

17                   1.       Relator has no claim for false claims under 31 U.S.C. § 3729  
18 (a)(1)(A) because the activities he claims were fraudulent were not tied to any  
19 invoices that Serco submitted for payment, the activities he complained about did  
20 not violate any federal rule, statute or regulation, Serco did not certify (express or  
21 implied) compliance with any earned value management requirements to receive  
22 payment from the U.S. government, and the U.S. government had full knowledge  
23 of and in some instances directed Serco’s activities;

24                   2.       Relator has no claim for false records under 31 U.S.C. § 3729  
25 (a)(1)(B) because there is no evidence that Serco falsified any records, the  
26 activities he claims were fraudulent were not tied to any invoices that Serco  
27 submitted for payment, the activities he complained about did not violate any  
28 federal rule, statute or regulation, Serco did not certify (express or implied)

1 compliance with any earned value management requirements to receive payment  
2 from the U.S. government, and the U.S. government had full knowledge of and in  
3 some instances directed Serco's activities;

4       3.     Relator has no claim for retention of overpayments under 31 U.S.C.  
5 § 3729 (a)(1)(G) because there is no evidence that Serco owed the U.S.  
6 government any money or owed a duty to pay the U.S. government;

7       4.     Relator has no claim for conspiracy under 31 U.S.C. § 3729 (a)(1)(C)  
8 because there is no allegation or evidence that Serco entered into an agreement  
9 with anyone to conspire to submit false claims or acted in furtherance of any such  
10 agreement, and, even if there was evidence of any agreement, Relator's claim is  
11 barred by the intra-corporate conspiracy doctrine;

12       5.     Relator has no claim for unlawful retaliation under Cal. Gov. Code  
13 § 12653 because his allegations all concern the federal False Claims Act, 31 U.S.C.  
14 § 3729, whereas Cal. Gov. Code § 12653 only concerns alleged false claims  
15 against California state or local government entities, and there is no evidence that  
16 Relator engaged in any protected conduct, that Serco was aware he was engaging  
17 in protected conduct, or that Serco retaliated against Relator for protected conduct;

18       6.     Relator has no claim under Cal. Labor Code § 1102.5 because there is  
19 no evidence that he engaged in protected conduct or a causal connection between  
20 his termination and his protected conduct; the evidence instead shows that Serco  
21 had a legitimate, non-discriminatory reason for laying off Relator when the U.S.  
22 government, Serco's customer, reduced and then eliminated Relator's job function;

23       7.     Relator has no claim for wrongful termination in violation of public  
24 policy because it is entirely derivative of Relator's statutory discrimination claims  
25 under Cal. Gov. Code § 12653 and Cal. Labor Code § 1102.5, and it fails when  
26 those statutory claims fail; and

27       8.     Relator has no claim for breach of contract of continued employment  
28 because the evidence shows that he was at all times an at-will employee.

1        This Motion is based on this Notice of Motion and Motion; Separate  
2 Statement of Undisputed Facts, Memorandum of Law in Support of this Motion;  
3 Declaration of Daniel P. Wierzba, Declaration of Kent D. Brown, Declaration of  
4 Suzette Mankel, Declaration of Alice Hammond, Declaration of Robert A. Burton,  
5 Declaration of Denise Ellison; Declaration of Francisco Magana, Motion to File  
6 Exhibits Under Seal, and Proposed Order on Motion to File Exhibits Under Seal,  
7 all filed concurrently herewith, as well as all pleadings and documents on file  
8 herein, and upon such other and further oral and written materials as may be  
9 presented at or before any hearing on this matter.

10 Serco is not requesting oral argument on this motion, and appearance will  
11 not be required by the Court unless the Court notifies the parties otherwise.

12 For the reasons set forth in this motion, and the accompanying supporting  
13 information, Serco respectfully moves this Court enter summary judgment in its  
14 favor, or, in the alternative, partial summary judgment on each of Relator's Counts  
15 in his First Amended Complaint, dismiss Relator's First Amended Complaint with  
16 prejudice, and award Serco such other relief as this Court deems appropriate.

DATED: April 21, 2014

Respectfully submitted,  
FOLEY & LARDNER LLP

By: /s/ Francis J. Burke, Jr.  
Francis J. Burke, Jr.

## SEYFARTH SHAW LLP

By: /s/ Daniel P. Wierzba  
Daniel P. Wierzba  
Attorneys for Defendant  
SERCO, INC.